IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4451 OF 2006

Maruti Dada Magar. .. Petitioner.

vs.

Kasabai Dada Magar

& Anr. . .. Respondents.

Mr. S.D. Patil for petitioner.

Mr. M.D. Angal for respondents.

CORAM : A.P. DESHPANDE, J.

DATE : 10th November, 2006.

P.C. . The present petitioner who is original defendant, moved an application purportedly under order 41 rule 27 of CPC for leading of additional evidence which is in the nature of production of a partition deed. 2. The respondent who is mother of the petitioner filed a civil suit for partition against the petitioner and his bother and claimed 1/3rd share. The case of the petitioner before the trial Court was that there was an oral partition during the life time of the father whereunder the petitioner has received half of the property and hence, the suit filed by the mother be dismissed. A perusal of the written statement of the petitioner would leave no room for doubt that the petitioner

has been all throughout contending that an oral partition has taken place during the life time of his father whereas before the First Appellate Court by moving an application under Order 41 rule 27 it is averred that a partition was effected under a deed of partition which was sought to be produced on record. The appellate Court has rejected the same mainly on the ground that the case of the petitioner has all throughout been of one being of oral partition whereas by permitting production of the partition deed the same would result in permitting the petitioner to change his case altogether from an oral partition to a partition in writing. Other reasons are also set out in the order by the first appellate court to justify the rejection of the application. I am of the clear view that once the petitioner sets up the case of oral partition, he could not have been permitted to lead additional evidence touching a partition under a written document. It may not be out of place to state that the so called deed of partition which was sought to be tendered before the First Appellate Court is not a registered document and the document does not indicate that it is a memorandum reducing oral partition in writing. The order under challenge does not call for any interference. Hence, the petition is summarily dismissed.

(A.P. Deshpande, J.)